

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



DELORES BERNICE FLENOY,

Charging Party,

v.

ALAMEDA COUNTY MEDICAL CENTER,

Respondent.

Case No. SF-CE-78-M

Request for Reconsideration

PERB Decision No. 1707-M

PERB Decision No. 1707a-M

February 4, 2005

Appearance: Delores Bernice Flenoy, on her own behalf.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration of Alameda County Medical Center (2004) PERB Decision No. 1707-M (Alameda County Medical Center) by Delores Bernice Flenoy (Flenoy). The unfair practice charge alleged that the Alameda County Medical Center (Medical Center) violated the Meyers-Milias-Brown Act (MMBA)¹ by retaliating against her for protected conduct.

CONTENTS OF THE REQUEST

The request for reconsideration contains an outline of evidence that Flenoy claims to have newly discovered in a declaration signed under penalty of perjury, which states that this evidence was not previously available to her. Attached to the declaration are five documents. The request itself describes these documents as supporting Flenoy's allegations that she was treated differently from other employees. These documents are summarized as follows:

¹MMBA is codified at Government Code section 3500, et seq.

A memorandum from Flenoy's supervisor Therese Davis (Davis) dated October 6, 2004 regarding sick time and vacation usage: This memorandum states that the sick time and vacation usage policy was not applied strictly across the board. As the policy was not applied evenly, Flenoy argues that her excessive tardiness was not a proper ground for discipline.

A memorandum dated May 3, 2004: This memorandum involves a complaint by one employee that an employee who attacked her did not receive discipline. Flenoy asserts that this memo shows that the Medical Center does not discipline employees for their violent acts, yet terminated her for attendance issues, violation of the bilingual services policy, and alleged dishonesty.

A Department of Health Services (DHS) report with cover letter to Flenoy dated November 5, 2002: This report summarizes an investigation conducted in response to a complaint by Flenoy regarding problems with implementation of the Medical Center's bilingual services policy and procedures.²² According to Flenoy, this document proves that there was no written bilingual services policy in place and shows that discipline on the basis of violation of such a policy was thereby inappropriate.

Attached documents dated April and August 2002 that, according to Flenoy, show that the Medical Center did not have a human resources manual: The April 1, 2002 memo from the Medical Center's legal counsel to SEIU Local 535 Representative Fred Beale (Beale) was to provide a copy of a new human resources policy manual for review and to assure Beale that the

²²A copy of Flenoy's actual complaint was not provided in the request and the DHS report does not summarize her complaint. The report appears to find deficiencies in the implementation of the policy, not that a policy did not exist. The report however did indicate that the investigator was informed by management that it was developing needed procedures and revising existing procedures. The report itself documents staff unawareness of the "Bilingual Services Directory," which lists contact and other relevant information about bilingual-designated employees. The report concluded that the hospital did not have reference material relevant to the services. Based on the rest of the report, the phrase "reference material" pertains to the Bilingual Services Directory, not a bilingual services policy.

new manual would not supplant the existing memorandum of understanding. The August 1, 2002 document is a copy of a grievance filed by Flenoy complaining about an employee who did not follow the human resources policy manual or the memorandum of understanding in setting time and attendance standards. The document also shows the denial of the grievance by Davis, Flenoy's supervisor. Flenoy concludes from these documents that since the Medical Center had no policy upon which to base her termination, her supervisors were allowed to discriminate against her.

DISCUSSION

PERB Regulation 32410³ governs requests for reconsideration and provides, in pertinent part:

(a) Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. An original and five copies of the request for reconsideration shall be filed with the Board itself in the headquarters office and shall state with specificity the grounds claimed and, where applicable, shall specify the page of the record relied on. Service and proof of service of the request pursuant to Section 32140 are required. The grounds for requesting reconsideration are limited to claims that: (1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence. A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case. (Emphasis added.)

³PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

In her request, Flenoy purports to introduce newly discovered evidence that was neither previously available nor could have been discovered with the exercise of reasonable diligence. Noting that Flenoy's charge was filed December 10, 2002, amended charge filed February 13, 2002, warning letter issued January 30, 2003, and dismissal issued October 23, 2003, it strains credibility to believe that documents dated April 1, 2002, August 1, 2002, and November 5, 2002 were not available to Flenoy before she filed her charge or before the dismissal was issued. Two of these documents were addressed to Flenoy. With regard to all three documents, Flenoy does not explain why these documents were not previously available or how she discovered them since the dismissal of her charge. Mere conclusory statements that the new evidence was not previously available or could not have been discovered with the exercise of reasonable diligence before the dismissal of the charge do not suffice to demonstrate their truth. (See, e.g., Hart District Teachers Association (Mercado and Bloch) (2001) PERB Decision No. 1456a.)

The remaining new evidence does not convince us that Flenoy has shown nexus between her protected activity and termination. Flenoy does not dispute that she was excessively tardy, was abusive toward non-English speaking patients, or had falsified records. There is nothing in these documents that contradicts the fact that the Medical Center progressively disciplined Flenoy about these issues before terminating her, i.e., that she was terminated for her misconduct, not her protected activity. Furthermore, the May and October 2004 documents involved incidents that occurred long after the events at issue in the charge, and thus are not relevant to the issues sought to be reconsidered.

In light of this discussion, the Board concludes that Flenoy has not met the requirements for reconsideration of Alameda County Medical Center.

ORDER

Delores Bernice Flenoy's request for reconsideration of the Board's decision in Alameda County Medical Center (2004) PERB Decision No. 1707-M is hereby DENIED.

Chairman Duncan and Member Neima joined in this Decision.